Peck/Jones Construction Corp. *and* Iron Workers Union Local No. 433. Case 31–CA–24883

DECISION AND ORDER

September 20, 2002

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On October 9, 2001, Administrative Law Judge James L. Rose issued the attached decision.[1] The General Counsel and Charging Party filed exceptions and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

The General Counsel alleged that the Respondent violated Section 8(a)(1) of the Act when it denied two union business agents access to its construction site at the Los Angeles International Airport (LAX) on October 26, 2000. The judge dismissed the complaint on the grounds that the business agents improperly entered the secured area of the jobsite by failing to sign in at the Respondent's trailer and by failing to have an escort with them on the jobsite, as required by the Respondent's security rules. The General Counsel excepts to these findings.

As discussed below, we agree with the judge that the business agents failed to follow the Respondent's reasonable and nondiscriminatory sign-in rule. Therefore, the union agents are not entitled to enforce their contractual right to access that might otherwise provide a basis for their claim.

The Respondent, a general contractor, has subcontracted the structural steel portion of the LAX project to Washington Ironworks. Washington Ironworks has a collective-bargaining agreement with the Charging Party, Iron Workers Union Local No. 433, which represents the subcontractor's employees on the LAX job. Washington Ironworks and the Union have agreed to the following access provision: "The Business Agent of the Union shall be permitted on all jobs but will in no way interfere with the men during working hours unless permission is granted by the individual employer."[3]

The Union's contractual right of access, however, is not without limitation. The Board has recognized a general contractor's right to enforce reasonable and nondiscriminatory security rules with regard to nonemployee union business agents who represent its subcontractor's employees. *Wolgast Corp.*, 334 NLRB No. 31, slip op. at 2, 11 (2001).

Here, the judge found, and we agree, that the Respondent's security rule requiring visitors to sign in was reasonable and was enforced against the union agents in a nondiscriminatory manner. The record shows that, at all relevant times, the Respondent posted a sign at the entry gate advising visitors that they must sign in at the Respondent's office. Once the visitors have signed in, the Respondent designates an authorized individual to escort them into the secured work area.[4]

Unlike the cases cited by the General Counsel,[5] the Respondent's sign-in rule was not inconsistent with the access provision of the Union's collective-bargaining agreement with Washington Ironworks. As noted above, the access provision in the collective-bargaining agreement grants the union agents access to the jobsite as long as the union agents do not interfere with employees during working hours. There is nothing in this provision that would excuse the union agents' failure to follow a reasonable security rule required of all nonemployee

[1] The judge inadvertently failed to note the appearance of David A. Rosenfeld, Esq. on behalf of the Charging Party.

[2] The General Counsel and Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

During the hearing, the General Counsel offered into evidence the position statement that the Respondent submitted during the Region's investigation of the unfair labor practice charge. The judge rejected the offer on the grounds that the position statement was a privileged settlement document and was not relevant. The General Counsel has excepted to the judge's refusal to accept the position statement into evidence.

We will reverse a judge's ruling only when the party urging such measure demonstrates that the judge's ruling was not only erroneous, but also prejudicial to its substantive rights. *Monroe Mfg.*, 323 NLRB 24, 25 (1997). Assuming arguendo that the judge's evidentiary ruling was erroneous, the General Counsel has not shown that he was prejudiced by the exclusion of the proffered evidence. The General Counsel did not specifically allege how the asserted discrepancies between the assertions made in the position statement and the testimony of the Respondent's general manager, William Hanson, would warrant a reversal of the judge's crediting of Hanson. Accordingly, we find no merit in the General Counsel's exception.

[3] The judge did not address whether the Union's representatives were operating in accord with the access provision in the Washington Ironworks contract on the date in question. For purposes of this decision, we assume, arguendo, that they were. Thus, we do not pass on whether the Union's representatives interfered with employees during working hours without permission.

[4] In adopting the judge's dismissal of the complaint, we rely only on the union agents' failure to sign in at the Respondent's trailer before entering the secured area. We find it unnecessary to pass on whether the Respondent's requirement that the union agents be escorted onto the jobsite is a reasonable access rule.

[5] These cases include: *Villa Avila*, 253 NLRB 76 (1980), enfd. 673 F.2d 281 (9th Cir. 1982); *C.E. Wylie Construction Co.*, 295 NLRB 1050 (1989), enfd. as modified 934 F.2d 234 (9th Cir. 1991); and *CDK Contracting Co.*, 308 NLRB 1117 (1992). The cited cases addressed the legality of a general contractor's rules that were inconsistent with the access provisions of the contract between the subcontractor and the union. We do not address that issue or related precedent in this case.

visitors to the secured areas of the jobsite. Because the union agents did not sign in before entering the jobsite, they were improperly on the jobsite and cannot now claim that their ejection from the secured area violated their contractual right of access.

Accordingly, we adopt the judge's dismissal of the General Counsel's complaint.

ORDER

The recommended Order of the administrative law judge is adopted, and the complaint is dismissed.

Dated, Washington, D.C. September 20, 2002

Wilma B. Liebman, Member

Michael J. Bartlett, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER COWEN, concurring.

I agree with my colleagues that the Respondent did not violate Section 8(a)(1) by requiring the union agents to leave the jobsite. As my colleagues have found, it is undisputed that the union agents failed to sign in, as the Respondent required, and thus their presence in the secured area of the jobsite violated the Respondent's reasonable, nondiscriminatory security rule.

Moreover, I find that the union agents' conduct is not covered by the access provision of the Union's agreement with the subcontractor, Washington Ironworks. As noted above, the agreement provided that "[t]he Business Agent of the Union shall be permitted on all jobs but will in no way interfere with the men during working hours." When the union agents sought admission to the site by calling to employees who were working and then talked to employees while they were working, they clearly interfered with the men during working hours. As a result, they were required under the contract to obtain the "permission of the individual employer." As that permission had not been given, the union agents failed to satisfy the contract's requirements, and therefore cannot assert a contractual claim to access. Thus, for both these reasons, I find that the union agents were improperly on the premises.

I disagree, however, with any implication that a general contractor's maintenance and/or enforcement of *any rule* that is inconsistent with the access provisions of a subcontractor's union contract is unlawful. I also disagree with prior cases to the extent that they can be read as supporting such a broad proposition. In any event, it is not necessary to pass on such issues to decide this case. As my colleagues note, this case does not raise the issue of the lawfulness of a rule that conflicts with a collective-bargaining agreement.

As a final matter, it should be noted that this case—which involves unauthorized access to secure areas of the Los Angles International Airport—arose prior to the events of September 11, 2001. Thus, nothing in this decision should be read as expressing any view on how the Board will evaluate union access questions arising under the Federally mandated heightened security restrictions now in place at airports throughout the nation.

Dated, Washington, D.C. September 20, 2002

William B. Cowen, Member

NATIONAL LABOR RELATIONS BOARD

Nikki Cheaney, Esq., for the General Counsel.

James A. Bowles, Esq., of Los Angeles, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Los Angeles, California, on August 6 and 7, 2001, upon the General Counsel's complaint alleging that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by denying a business agent[1] of the Charging Party access to its construction site at the Los Angeles International Airport (LAX) on October 26, 2000.[2]

The Respondent generally denied that it committed any violations of the Act and affirmatively contends that the business agent was improperly in a restricted area, having neither an appropriate security badge nor being escorted by someone with the authority to do so.

Upon the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I make the following findings of fact, conclusions of law, and recommended Order

I. JURISDICTION

The Respondent is a corporation engaged in the construction industry at various locations including terminal 4 of LAX. In the course and conduct of its business, the Respondent annually purchases and receives from points outside the State of California goods, products, and materials valued in excess of $50,000. The Respondent admits, and I conclude, that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] Counsel for the General Counsel argues that in March 2001 the Union's business agent was also denied access to the LAX jobsite. This was not alleged in the complaint as a violation of the Act. Though there was some testimony concerning a subsequent event, this assertion was not fully litigated. Therefore no findings will be made concerning it.

[2] All dates hereafter are in 2000, unless otherwise indicated.

II. THE LABOR ORGANIZATION INVOLVED

Iron Workers Union Local No. 433 (the Union) is admitted to be, and I conclude is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

The Respondent is the general contractor for certain construction at the LAX American Airlines Terminal 4. Most of the project is not in the secured area as defined by LAX and the Federal Aviation Administration, but about one third of it is. LAX has security policies in effect which define who may have access to restricted areas and how such access is obtained. So far as material here, each employee who receives a security clearance is given a badge, and only those with badges may be in restricted areas. However, visitors may come into restricted areas on an ad hoc basis if escorted by one with the authority to do so—such authority being designated by a blue badge.

A visitor is defined in the LAX access procedures as "A person needing temporary or onetime access who will be in the constant and immediate presence of an authorized person while in the tenant's exclusive leasehold area." The Respondent further requires all visitors to sign in and be assigned an escort.

Jorge Montenegro is an LAX police officer currently with the airport security coordination unit. He testified to the procedure for allowing a visitor who does not have a security badge access to a secured area:

> First of all, the Company in charge of the site will have to be notified and then an authorized escort will be provided. Authorized escort meaning an individual who is aware of all the current information as to proper escorts and then he would be with this individual throughout the entire time he is entering the restricted area. At no time will the person be out of his sight.

The Respondent subcontracts the structural steel portion of the LAX project to Washington Ironworks, whose employees are represented by the Union. On October 25, the Union's job steward, Mitchell Ponce, called Business Agent Thomas Moxley, stating that nonunion members were doing work within the Union's craft jurisdiction.

Thus on October 26, Moxley, along with Bruce Gerometta, a business agent for a sister local, went to the jobsite. Rather than go to the Respondent's offsite office in order to gain access to the work area (sign in and be assigned an escort), as the Respondent's rules require, Moxley and Gerometta went to a padlocked gate at the work area, apparently used for construction access. Moxley got Ponce's attention, and Ponce in turn yelled to someone to let them in, the gate being locked from the inside. Ponce was unavailable since he was working 40 to 45 feet above the ground. According to Moxley, using this gate "saved us steps."

No one testifying knows who the employee was who let Moxley and Gerometta onto the jobsite; but it was probably an employee (perhaps a supervisor) of the Respondent, since only the Respondent has keys to the lock. Ponce and Moxley testified that when the two business agents arrived on the jobsite Gene Perry, a foreman for Washington Ironworks, escorted them onto the job. Then James Wray, the Washington Ironworks general foreman, approached them and talked a bit and Perry left. Moxley testified that at all times either Perry or Wray was within a few feet. However, I reject this testimony. Wray, a witness for the General Counsel and a union member, testified that when he was talking to Moxley no one else was nearby. He also testified that he was not Moxley's escort (though he did have that authority) and that after talking to them he left the immediate area and was 50 to 100 feet away when they were told to leave the site.

William Hanson, the Respondent's general foreman, observed Moxley and Gerometta standing alone and told his carpenter foreman, Guillermo Vidrio, to find out if they had badges or an escort. Vidrio called back that they had neither. Then Hanson approached and asked Moxley who their escort was. According to Hanson, Moxley replied that Ponce was. Moxley admitted that he "may" have said Ponce was their escort. However, Ponce was 40 to 45 feet in the air and scarcely in a position to exert any control over Moxley and Gerometta. Hanson told them they had to leave and they did so, through the gate they had entered.

B. Analysis and Conclusions

Citing cases not involving airport security or access to restricted areas, the General Counsel argues that by telling Moxley and Gerometta they had to leave the jobsite, the Respondent violated Section 8(a)(1)—that agents of a union representing employees are entitled to access to the jobsite. *C.E. Wylie Construction Co.*, 295 NLRB 1050 (1989), enfd. as modified 934 F.2d 234 (9th Cir. 1991). And a general contractor violates the Act by denying a business agent for subcontractor employees access to a jobsite. *Wolgast Corp.*, 334 NLRB No. 31 (2001). The principal issue in these cases is whether there were imposed "unreasonable and discriminatory rules relating to access." *CDK Contracting Co.*, 308 NLRB 1117 fn. 1 (1992).

The General Counsel appears to take the position that literal enforcement by the Respondent of the LAX security rules is not warranted—that Moxley and Gerometta were always somewhat near a badged employee and were some 300 feet from the nearest airplane. And, implicitly, the General Counsel seems to argue that Moxley and Gerometta were not a security threat. On brief, the General Counsel states: "An escort is a reasonable precaution for the casual visitor, but it cannot be a requirement of a union representative engaged in a lawful visit to employees on a worksite, as in this case." (Citation omitted.) Even before September 11, 2001, I would have rejected this argument.

The General Counsel also argues that "Tom Moxley and Bruce Gerometta complied with airport security requirement that they remain in the constant and immedite presence of an authorized individual while in the restricted area." I find this not to have been the case, even assuming that such would have satisfied the security rules. While Perry may have escorted them onto the job, he left when Wray approached, and then Wray, by his testimony, left and when the business agents were confronted by Hanson, they were alone.

Beyond that, from the testimony of Montenegro, whom I credit, an escort is a specifically designated individual. The LAX security procedures do not provide for shifting escorts.

The General Counsel further contends that Hanson did not follow the security rules because he did not detain Moxley and Gerometta as is required by the security procedures. Nor did he report the security violation for 2 days. No doubt Hanson himself was remiss. And it is doubtful that Moxley and Gerometta should have been allowed through the padlocked gate. However, the apparent violations of access procedures are not mate-

rial. Nor is it material that Moxley may have been on the job earlier in violation of the access rules. The issue here is whether the security rules were reasonable and whether Moxley and Gerometta were in a secured area in breach of these rules. I conclude they were.

This case is not about denying business agents access to a jobsite. The narrow issue here is whether the business agents came on the job in violation of reasonable rules. They did not sign in. They probably were allowed through a gate not authorized for visitors. They did not have badges and they did not have an escort who stayed with them at all times. Perry brought them on the job, but he left to supervise other work. Ponce was always 40 to 45 feet above the ground. I conclude that Moxley and Gerometta did not have a designated escort while they were on the job, nor did they follow the reasonable rule that they sign in and be assigned an escort. Finally, that some badged employees might have been in the area near Moxley and Gerometta does not mean they complied with the security rule of having a designated escort.

If one does not precisely abide by the rules regarding access to restricted areas at an airport, one is not entitled to be in such areas. In cases involving airport security, Section 7 rights must yield to restrictions concerning access. Moxley will have to take the few extra steps and go through the Respondent's office if he wants to visit the jobsite, and arrange for someone to escort him. This, of course, may limit the spontaneity with which business agents visit jobsites in airport restricted areas; but such does not seem to be an unreasonable burden when weighed against the importance of airport security.

Moxley can come on the project when he follows the rules. He did not do so on October 26. I simply do not believe that on the facts of this case, the Respondent violated the Act, even though agents of the Respondent may well have violated LAX rules concerning access to secured areas. Accordingly, I shall recommend the complaint be dismissed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [3]

ORDER

The complaint is dismissed in its entirely.

Dated, San Francisco, California, October 9, 2001.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.